Supreme Court, U.S.
FILED

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No. 02-

IN THE

Supreme Court of the United States

WILLIAM J. CONERY,

Petitioner,

v.

JOHN NICCOLLAI, JR., individually and in his official capacity as President of Local 464A, Food and Commercial Workers Union, AFL-CIO, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

LOUIE NIKOLAIDIS
LEWIS, GREENWALD, CLIFTON & NIKOLAIDIS, P.C.
340 George Street
New Brunswick, NJ 08901
(732) 545-2303

Attorneys for Petitioner

175487

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED FOR REVIEW

1. Whether respondent union's deliberate actions to suppress petitioner/member's dissenting activities, by repeatedly threatening him with physical violence, preventing him from distributing critical leaflets, placing him under constant surveillance, and subjecting him to a series of unfounded internal union disciplinary proceedings and frivolous lawsuits, constitute *per se* violations of Title I of the LMRDA?

2. Whether respondent union, after having deliberately engaged in a succession of purposeful actions to suppress petitioner/member's dissenting activities, is absolved from the statutory claims asserted by petitioner that his Title I rights had been violated, simply because petitioner persisted in his opposition to the entrenched union leadership notwithstanding the union's repressive actions?

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Petitioner respectfully submits that a writ of certiorari should issue to review the Judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 34 Fed. Appx 839, 2002 WL 517293 (3d Cir. 2002) and is reprinted in Appendix A at 1a. The District Court's slip opinion in 92 Civ. 840 (D.N.J. March 31, 1998) is reprinted in Appendix B at 10a. The Magistrate Judge's Report and Recommendation is reprinted in Appendix C at 12a. The Order of the Court of Appeals denying rehearing and *en banc* review is reprinted in Appendix D at 33a.

STATEMENT OF JURISDICTION

The Order of the Court of Appeals affirming the District Court's opinion of March 31, 1998 was dated and entered on April 4, 2002. The Order of the Court of Appeals denying petitioner's motion for rehearing and *en banc* review was dated and entered on May 9, 2002. This petition is timely filed within 90 days of the Order of the Court of Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Petitioner first invoked federal court jurisdiction in the case under 28 U.S.C. §§ 1331 and 1337 and 29 U.S.C. § 412.

STATUTES AND REGULATIONS INVOLVED

The statute involved in this case is Title I of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 411. The pertinent text of this statute is set forth in Appendix E at 38a.

STATEMENT OF THE CASE

Petitioner William J. Conery ("Conery") was at all relevant times a union butcher for Shop Rite Supermarkets, Inc. ("Shop Rite"). Conery joined respondent Local 464A, United Food Commercial Workers Union ("the union") in 1956, and subsequently became an active union member, serving as a union shop steward for 15 years.

Conery's problems with the union began in 1987 when he declared his candidacy for a position on the elected contract negotiating committee and composed a leaflet entitled "Union Renewal" which was critical of the union president, respondent John Niccollai Jr. ("Niccollai"), and other incumbent union officers. Prior to the April 1987 membership meeting at which Conery succeeded in being elected to the negotiating committee, Niccollai told him that if he passed out his leaflet at that meeting "I'll throw your fuckin ass out of here, you fuckin cocksucker. This shit is anti-union. If you pass this out in the meeting, I'm throwing you out." Other candidates distributed their leaflets at the meeting but Conery, intimidated by Niccollai's threats, did not distribute his critical leaflet.

From that point on the relationship between Conery and the union establishment rapidly deteriorated. During the ensuing years, Conery was subjected to continuous harassment by the union intended to stifle his persistent challenges to the entrenched union leadership. Such harassment included the repeated suppression of Conery's leaflet distributions, constant surveillance, numerous threats of physical violence, baseless union disciplinary proceedings and frivolous lawsuits including a $9,000,000 RICO action which alleged that Conery's dissident activities, including running for president, were really an attempt at extortion. On one occasion, Niccollai called Conery at work

and told him to "back off, asshole, or I'll get you." He also told Conery that he didn't "want any more of that shit passed out, and I'm not going to warn you again . . . I'll bring you to your knees and bury you once and for all . . . your job is on the line." On yet another occasion, Niccollai called Conery at work, and while on speaker phone in the presence of other union employees, told him he would "get" him and that "the game had just begun."

The union's harassment of Conery escalated into death threats and resulted in his nervous breakdown and extended hospitalization. Conery's hospitalization forced him to abandon his election campaign for union president in the 1989 union election. Nonetheless, in spite of the union's unrelenting campaign to intimidate him, Conery persisted in challenging the union leadership after 1989 through his leaflets and participation in union elections.

The union deliberately publicized its harassment of Conery in order to chill the interest of other members in pursing their Title I rights to oppose the union leadership. To this end, Niccollai arranged for his threats to Conery to be heard by other Shop Rite worker/members over the store's public address system and the union's secretary-treasurer personally served Conery with process in the frivolous RICO suit at the Shop Rite facility in the presence of many of Conery's co-workers.

I. PETITIONER CONERY'S COMPLAINT

In his February 24, 1992 complaint, Conery asserted that the defendants had violated his rights and those of other union members under Title I of the LMRDA by a succession of harassing actions, including threats of violence, photographic

surveillance, disruption of leaflet distributions, and the filing of baseless internal union charges and frivolous civil and criminal complaints against him.

II. THE DISTRICT COURT'S SUMMARY JUDGMENT ORDER

The District Court granted summary judgment for defendants based on the Report and Recommendation ("the Report") of the designated Magistrate Judge.

III. THE COURT OF APPEALS' DECISION

The Third Circuit affirmed, invoking *Calhoon v. Harvey*, 379 U.S. 134 (1964) as holding (a) that the provisions of LMRDA, § 101(a)(1), 29 U.S.C. § 411(a)(1) are narrow in scope and (b) that there can be no violation of § 101(a)(1) unless the complaining union member has been denied the right to nominate or vote, and citing *Sheet Metal Workers Int'l Assoc. v. Lynn*, 488 U.S. 347 (1989) as holding that a violation of a union member's free speech rights, by itself, is insufficient to violate § 101(a)(2).

REASONS FOR GRANTING THE WRIT

A. THE CONFLICT IN THE CIRCUITS WITH RESPECT TO THE THIRD CIRCUIT'S NARROW CONSTRUCTION OF TITLE I OF THE LMRDA

The affirmance by the Third Circuit not only conflicts in several respects with the rulings of other Circuits in its construction of Title I of the LMRDA, but also misapprehends and misapplies the decisions of the Supreme Court addressing that remedial statute.

The Third Circuit's holding that the provisions of Title I must be narrowly construed conflicts with the broad construction accorded Title I by other circuits, and is plainly refuted by the legislative history of the statute and the decisions of this Court.

Other circuits have consistently held that Congress enacted the LMRDA to shield union members from arbitrary, autocratic, and despotic control by union officers and leaders.[1] *Burroughs v. Operating Engineers Local 3*, 686 F.2d 723, 727 (9th Cir. 1982); *Schuchardt v. Millwrights and Machinery Erectors Local Union No. 2834*, 380 F.2d 795, 797 (10th Cir. 1967). Those circuits have followed the Court's decision in *Hall v. Cole*, 412 U.S. 1, 7 (1973), which stressed the importance of judicial protection of the rights enumerated in Title I:

> The Labor-Management Reporting and Disclosure Act of 1959 was based, in part, on a congressional finding "from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption,

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1. Congress chose to characterize members' rights under Title I in broad terms such as the right "to attend membership meetings," "the right to meet and assemble freely with other members," and the right "to express any views, arguments, or opinions." 29 U.S.C. §§ 411(a)(1) and (2). Congress specifically rejected one bill which contained a detailed Bill of Rights section, thirty pages in length, opting instead for the more general provisions that broadened members' rights. H.R. 4773. *See* Labor-Management Reform Legislation hearing on H.R. 3540, H.R. 3302, H.R. 4473 before a Joint Subcomm. of the House. Comm. on Education and Labor, 86th Cong., 1st Sess. 1475 (1959).

> disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct. . . ." 29 U.S.C. § 401(b). . . . Thus, Title I of the LMRDA – the "Bill of Rights of Members of Labor Organizations" – was specifically designed to promote the "full and active participation by the rank and file in the affairs of the union," and, as the Court of Appeals noted, the rights enumerated in Title I were deemed "vital to the independence of the membership and the effective and fair operation of the union as the representative of its membership." (footnotes omitted) *Id.* at 7.

Other circuit courts, recognizing the remedial nature of Title I, have liberally construed the rights contained therein. *See Smith v. United Mine Workers*, 493 F.2d 1241 (10th Cir. 1974); *Brotherhood of Boiler Makers v. Braswell*, 388 F.2d 193 (5th Cir. 1968), *cert. den*, 391 U.S. 935 (1968); *Marshall v. Local 1010, United Steelworkers*, 498 F. Supp. 368 (N.D. Oh. 1980), *aff'd*, 664 F.2d 144 (7th Cir. 1981). In *Marshall*, the court stated:

> The vice which the statute was to correct . . . was the use by the union officers of the "single power of their offices to emasculate challenges to their leadership by the rank and file, and thereby perpetuate dynastic control. The statute should be read and applied to correct the vice of dynastic control, not to perpetuate it." *Id.* at 378.

The Third Circuit cites *Calhoon v. Harvey*, 379 U.S. 134 (1964) as calling for a narrow construction of § 101(a)(1). But *Calhoon* was a jurisdictional case and did not involve

free speech rights. In *Calhoon*, the Court held that Title IV of the LMRDA, rather than § 101(a)(1), governed the claim that a union's nomination process was invalid and that a member challenging a union eligibility rule for candidates had to proceed in accordance with the requirements of Title IV, by first pursuing his administrative remedies within the union and, subsequently, at the Department of Labor.[2] *Calhoon* does not even tangentially concern § 101(a)(2), the free speech protections which are central to Conery's claim. Moreover, the Court in *Calhoon* recognized the remedial nature of the LMRDA. As Justice Stewart stated:

> Repeated attempts were made by representatives of organized labor, among other groups, to have the strict mandate of this so-called Bill of Rights modified, or eliminated altogether. Despite these efforts to remove Title I, it endured, and indeed was amended to provide stronger remedial provisions than those contained in the original version.

Id. at 144 (Stewart, J., concurring). It is black letter law that remedial statutes are to be liberally construed.

The implication in the Third Circuit's holding that the free speech provisions of § 101(a)(2) apply only in the context of a union election (and then only to those members who, because of union harassment, are dissuaded from participating in such election) conflicts with decisions in the

2. This holding was narrowed in a subsequent case which held that § 101(a)(1) was applicable to the election process as long as the court intervention did not interfere with an ongoing election. *Crowley v. Teamsters Local 82*, 467 U.S. 526 (1984).

following circuits: *Guzman v. Bevona*, 90 F.3d 641 (2d Cir. 1996); *Black v. Ryder/P.I.E. Nationwide*, 970 F.2d 723 (6th Cir. 1992); *Aircraft Mechanics v. Transport Workers Union*, 98 F.3d 597 (10th Cir. 1996); *Guidry v. International Union of Operating Engineers, Local 406 et al.*, 882 F.2d 929 (5th Cir. 1989), *reh'g denied*, 887 F.2d 1083 (5th Cir.), *cert. granted, judgment vacated on other grounds*, 494 U.S. 1022, 110 S. Ct. 1465 (1990), *on remand*, 907 F.2d 1491 (5th Cir. 1990).

In *Guidry*, *supra*, the Fifth Circuit stated:

> The flaw in the defendants' argument is their assumption that in order to assert a violation of section 101(a)(2) of the LMRDA, a plaintiff must show that he or she spoke out in opposition to Union leadership in the context of an election. . . . The statute itself speaks of the right of every union member to "express any views, arguments or opinions," 29 U.S.C. § 411(a)(2) . . . and does not limit such expression to one occurring in the context of a union election. In fact, the statute refers separately to a union member's right to express his views upon candidates running for union office. 882 F.2d at 936.

Plainly, a union member's right to express views and opinions without retaliation applies to all internal union debate, not just electioneering. As the Tenth Circuit noted in *Aircraft Mechanics*, *supra*:

> The Supreme Court has on numerous occasions consistently identified the paramount purpose of § 411(a)(2), and the LMRDA generally, to be that

of assuring rank-and-file members' democratic participation in intra-union affairs, such as voting in union elections, standing for union office, and approving (or challenging) official union policies and decisions. See, e.g., *Reed v. United Transp. Union*, 488 U.S. 319, 325, 109 S. Ct. 621, 625-26, 102 L. Ed. 2d 665 (1989); *Sadlowski*, 457 U.S. at 112, 102 S. Ct. at 2346 (majority op.), 122-23, 102 S. Ct. at 2350-51 (White, J., dissenting); *Finnegan v. Leu*, 456 U.S. at 435-37, 102 S. Ct. at 1870-72; *Hall v. Cole*, 412 U.S. 1, 14; 93 S. Ct. 1943, 1950-51, 36 L. Ed. 2d 702 (1973). Members' free speech rights are, accordingly, seen as a necessary means for the "improvement or preservation of democracy *within the union*." *Reed*, 488 U.S. at 326, 109 S. Ct. at 626 (emphasis added); see also *Sadlowski*, 457 U.S. at 112, 102 S. Ct. at 2346 ("democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal"). 98 F.3d at 600.

B. THE UNION'S DELIBERATE ACTIONS TO SUPPRESS CONERY'S AND OTHER MEMBERS' DISSENTING ACTIVITIES VIOLATES TITLE I OF THE LMRDA REGARDLESS OF WHETHER CONERY PERSISTED IN HIS OPPOSITION NOT-WITHSTANDING THE UNION'S REPRESSIVE ACTIONS

The Third Circuit in this case held that the free speech guarantees of Title I provide a statutory cause of action only for dissenting union members who succumb to union

harassment, but not for the Conerys of this world who bravely persist to the end by running for union office and supporting opposition candidates.[3] We find no decisions in other circuits which support this novel interpretation of the LMRDA. Certainly nothing in the Court's decision in *Sheet Metal Workers Int'l. Assoc. v. Lynn*, 488 U.S. 347 (1989), upon which the Third Circuit relies, gives support to this counter-intuitive interpretation of Title I.

In *Lynn*, the Court addressed the question of whether the removal of *elected* business agents violated Title I in view of the Court's prior holding in *Finnegan v. Leu*, 456 U.S. 431 (1982) that a newly elected union president could remove *appointed* business agents without violating Title I. In *Finnegan*, the Court reasoned that denying an elected union officer the right to appoint business agents who shared his philosophy would undermine the democratic governance of the union. Distinguishing *Finnegan*, the Court held in *Lynn* that the retaliatory removal of an elected officer stated a cause of action under § 101(a)(2):

> Furthermore, the potential chilling effect of Title I free speech rights is more pronounced when elected officials are discharged. Not only is the fired official likely to be chilled in the exercise of his own free speech rights, but so are the members who voted for him. See *Hall v. Cole*, 412 U.S. 1, 8, 93 S. Ct. at 1947-48, 36 L. Ed. 2d 702 (1973). Seeing Lynn removed from his post just five days after he led the fight to defeat yet another dues

3. The Third Circuit misconstrued the record in this regard since the harassment that Conery endured, in fact, caused him to be institutionalized in a mental health facility, thus preventing him from continuing his campaign for union president.

> increase proposal, other members of the Local may well have concluded that one challenged the union's hierarchy, if at all, at one's peril. This is precisely what Congress sought to prevent when it passed the LMRDA. "It recognized that democracy would be assured only if union members are free to discuss union policies and criticize the leadership without fear of reprisal." *Sadlowski*, 457 U.S. at 112, 102 S. Ct. at 2346, 72 L. Ed. 2d 707. 488 U.S. at 355.

Lynn plainly does not stand for the proposition that union dissidents may be harassed with impunity because "the democratic governance of the union is not affected."

However, other decisions of this Court teach us that where a union member's free speech rights under § 101(a)(2) have been violated, even if no actual injury results from the denial of such rights, at least nominal damages must be awarded.

In *Reed v. United Transportation Union*, 488 U.S. 319, 334 (1989), which determined the statute of limitations governing Title I claims, the Court noted that § 101(a)(2) was "modeled on the First Amendment to our Constitution," and analogized § 101(a)(2) claims to §1983 claims. In *Carey v. Piphus*, 435 U.S. 247 (1978), the Court held that a plaintiff in a § 1983 action could recover compensatory damages if he proved actual injury caused by the denial of his constitutional rights, but could recover nominal damages without such a showing. The Court stated:

> Common-law courts traditionally have vindicated deprivations of certain "absolute" rights that are

> not shown to have caused actual injury through the award of a nominal sum of money. By making the deprivation of such rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed; but at the same time, it remains true to the principle that substantial damages should be awarded only to compensate actual injury or, in the case of exemplary or punitive damages, to deter or punish malicious deprivations of rights. (footnote omitted). 435 U.S. at 266.

Furthermore, it can be presumed that other members, aware of the union's harassment of Conery, including the RICO lawsuit against him, were chilled in exercising their Title I rights. This is particularly true in this case where the union made a point of publicly chastising Conery by threatening him at work over a public address system and having a union officer personally serve him with a nine million dollar lawsuit in front of his co-workers. *See, e.g., Bill Johnson's Restaurant, Inc. v. NLRB*, 461 U.S. 731, 741 (1983).

C. THE COURT SHOULD RESOLVE THE FOREGOING CIRCUIT SPLITS BECAUSE SUCH RESOLUTION IS VITALLY IMPOR-TANT TO UNION MEMBERS AND THEIR UNIONS NATIONWIDE

The vigorous enforcement of the Title I rights of union members is of immediate and vital concern to workers, unions, employers and the federal and state courts throughout the country. Moreover, the questions considered and determined in this case are not limited to Title I guarantees but impact upon the enforcement of the whole array of legislation to protect workers.

CONCLUSION

For the reasons above set forth, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LOUIE NIKOLAIDIS
LEWIS, GREENWALD, CLIFTON
& NIKOLAIDIS, P.C.
340 George Street
New Brunswick, NJ 08901
(732) 545-2303

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED APRIL 4, 2002

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 01-2870

WILLIAM J. CONERY; FRANK A. FUSCO;
KENNETH BURDGE

v.

JOHN NICCOLLAI, JR., individually and in his official capacity as President of Local 464A, Food and Commercial Workers Union, AFL-CIO; RAMON RANDO, individually and in his official capacity as Secretary-Treasurer of Local 464A; GRIFF MCELROY, individually and in his capacity as Recorder of Local 464A; GEORGE PLESA, individually and in his official capacity as Chairman of the Executive Board of Local 464A; FRANK HANLEY, individually and in his official capacity as Contract Administrator; FRANK DICHRISTINA; DONALD LIGON; WILLIAM WRIKER, individually and in their official capacities as Business Agents of Local 464A; UNITED FOOD COMMERCIAL WORKERS UNION, AFL-CIO; SHOPRITE SUPER-MARKETS, INC.; WALTER BIERNACKI, individually and in his official capacity as Vice President of Local 464A; WAYNE WILLIAMS, individually and in his capacity as Director-Pension & Prescription Benefits of Local 464A; JOHN T. NICCOLLAI, SR., individually and in his capacity as Trustee of the Local 464A Pension Fund; Local 464A, UNITED FOOD AND COMMERCIAL WORKERS

Appendix A

INTERNATIONAL UNION, AFL-CIO; LOCAL 464A PENSION FUND ADMINISTRATOR AND BOARD OF TRUSTEES; MARTIN QUINN, in their capacity as administrators and trustees of the Local 464A Pension Fund; GILBERT C. VUOLO, in their capacity as administrators and trustees of the Local 464A Pension Fund; DEWEY CANNELLA, in their capacity as administrators and trustees of the Local 464A Pension Fund; ISADORE ZALKIN, in their capacity as administrators and trustees of the Local 464A Pension Fund,

v.

JOHN NICCOLLAI, JR.; RAMON RANDO; GRIFF MCELROY; GEORGE PLESA; FRANK HANLEY; FRANK DICHRISTINA; DONALD LIGON; WILLIAM WRIKER; WAYNE WILLIAMS; JOHN T. NICCOLLAI, SR.; MARTIN QUINN; GILBERT C. VUOLO; DEWEY CANNELLA; ISADORE ZALKIN; WALTER BIERNACKI,

Third Party Plaintiffs,

v.

HAROLD KRIEGER, The Estate of Harold Krieger; STEPHANIE KRIEGER; LOWELL HARDWOOD, as Executors of the Estate of Harold Krieger,

Third Party Defendants.

Appendix A

(D.C. No. 92-cv-00840)

FRANK A. FUSCO; KENNETH BURDGE,

v.

JOHN T. NICCOLLAI, JR., individually and in his capacity as President of local 464A, United Food and Commercial Workers International Union, and as Trustee of the Local 464A Pension Fund; RAMON RANDO, individually and in his capacity as Secretary-Treasurer of Local 464A and as Trustee of the Local 464A Pension Fund; GRIFF MCELROY, individually and in his capacity as Recorder of Local 464A; FRANK HANLEY, individually and in his capacity as Contract Administrator of Local 464A; WAYNE WILLIAMS, individually and in his capacity as Director-Pension & Prescription Benefits of Local 464A; JOHN T. NICCOLAI, SR., individually and in his capacity as Trustee of the Local 464A Pension Fund; Local 464A, United Food and Commercial Workers International Union, AFL-CIO; LOCAL 464A PENSION FUND ADMINISTRATOR AND BOARD OF TRUSTEES; WALTER BIERNACKI, individually and in his capacity as Vice President of Local 464A and as Trustee of the Local 464A Pension Fund; MARTIN QUINN, in their capacity as administrators and trustees of the Local 464A Pension Fund; GILBERT C. VUOLO, in their capacity as administrators and trustees of the Local 464A Pension Fund; DEWEY CANNELLA, in their capacity as administrators and trustees of the Local 464A Pension Fund; ISADORE ZALKIN, in their capacity as administrators and trustees of the Local 464A Pension Fund.

Appendix A

(D.C. No. 92-cv-01458)

William J. Conery,

Appellant

Appeal from the United States District Court
for the District of New Jersey, Newark
(D.C. Civ. Nos. 92-CV-840 & 92-CV-1458)

Before: SCIRICA and COWEN, *Circuit Judges*,
RESTANI*, *Judge*, United States Court of
International Trade

(Filed April 4, 2002)

OPINION

RESTANI, *Judge*.

On March 31, 1998, the District Court granted summary judgment for defendants based on the Report and Recommendation ("Report"), dated January 14, 1998, of Magistrate Judge G. Donald Haneke. Previously, on September 26, 1994, the District Court had granted defendants' partial summary judgment as to Conery's malicious prosecution claims.

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* Honorable Jane A. Restani of the United States Court of International Trade, sitting by designation.

Appendix A

STATEMENT OF FACTS

This appeal arises out of claims brought by William J. Conery, Kenneth Burdge and Frank Fusco against various officers of Local 464A, United Food and Commercial Workers Union ("Local 464A") for allegedly engaging in a continuous and systematic campaign of harassment to prohibit Conery and other union members from exercising their rights under the Labor Management Reporting and Disclosure Act ("LMRDA") and National Labor Relations Act ("NLRA") in order to suppress dissent within Local 464A.

In 1982, defendant John T. Niccollai, Jr. was appointed to his position as President of defendant Local 464A as a result of the death of the former president. Defendant Niccollai was re-elected President in 1983, 1986, 1989, 1992 and 1995. Conery maintains that various officers of Local 464A organized and executed a campaign of harassment against him in response to Conery's dissident activities in Local 464A, including Conery's decision to run for president in Local 464A's elections in 1989 and 1992. According to Conery, this harassment included (a) the filing of a civil RICO lawsuit in retaliation for Conery's dissident union activities; (b) the filing of an assault charge in Municipal Court to "convince" him to stop participating in union affairs; and (c) the verbal and physical harassment of Conery dating back to April of 1987 in order to suppress dissent within the union.[1]

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1. The factual and background statements are adopted from the Report, which we find to be correct in its essentials.

Appendix A

DISCUSSION

Conery asserts violations of his rights under Sections 101(a)(1)(2) and (4) of the LMRDA, 29 U.S.C. §§ 411(a)(1)(2) and (4). Section 101(a)(1) was intended to guarantee union members the right to participate in Union campaigns and elections and to attend membership meetings. That section provides:

> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums or a labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

LMRDA § 101(a)(1), 29 U.S.C. § 411(a)(1). The United States Supreme Court has held that the provisions of § 101(a)(1) are narrow in scope. *Calhoon v. Harvey,* 379 U.S. 134, 138-39 (1964). The *Calhoon* Court explained that § 101(a)(1) is:

> no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote. And Congress carefully prescribed that even this right against discrimination is "subject to reasonable rules and regulations by the union."

Id. A cause of action by a union member cannot be sustained under § 101(a)(1) without some claim of discrimination and some demonstration that the plaintiff has been denied the right to nominate or vote. *Id.*

Section 101(a)(2) was intended to guarantee union members the right to express their views and opinions regarding union elections and officers. That section provides in relevant part:

> Every member of any labor organization shall have the rights . . . to express any views, arguments or opinions . . . Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

LMRDA § 101(a)(2), 29 U.S.C. § 411(a)(2). Nevertheless, the Supreme Court has held that a violation of free speech rights by itself is insufficient to violate § 101(a)(2). *Sheet Metal Workers' Int'l Assoc. v. Lynn,* 488 U.S. 347, 353 (1989). The infringement on free speech must be viewed with reference to the basic objective the LMRDA. *Id.* That objective is "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open periodic elections." *Finnegan v. Leu,* 456 U.S. 431, 441 (1982).

Appendix A

As set forth in detail in the Report, Conery participated fully in union elections and spoke his mind. He ran for office and supported other candidates. None of the actions of the Local 464A officials interfered with Conery's rights to vote for and nominate candidates, nor did he present evidence establishing interference with the democratic governing of the union. The Report did not mischaracterize the facts or misinterpret the law and was properly adopted by the District Court.

29 U.S.C. § 411(a)(4) forbids union officials from barring its members from instituting legal proceedings. Apparently, Conery's claim under § 411(a)(4) relates to attempts to forestall further complaints to the NLRB. Conery did not discuss § 411(a)(4) in his briefs. To the extent this issue is not waived, Conery did not establish material facts at issue with regard to claim arising under § 411(a)(4).

The District Court also properly granted summary judgment as to the state law claim for malicious prosecution for failure to raise material facts as to a special grievance under New Jersey law. *See Venuto v. Carella, Byrne, Bain, Gilfillan, Cecchi & Stewart, P.C.*, 11 F.3d 385, 392 (3rd Cir.1993). We do not consider plaintiff's argument, raised for the first time on appeal, that the special grievance requirement does not apply to a criminal complaint.

The judgment of the District Court will be AFFIRMED.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Jane A. Restani
Judge

DATED: April 4, 2002

Appendix A

Appeal from the United States District Court
for the District of New Jersey, Newark
(D.C. Civ. Nos. 92-CV-840 & 92-CV-1458)

Before: SCIRICA and COWEN, *Circuit Judges*,
RESTANI*, *Judge*, United States Court of
International Trade

JUDGMENT

This cause came on to be heard from the United States District Court for the District of New Jersey, Newark.

On consideration whereof, it is now hereby ADJUDGED and ORDERED by this court that the order and judgment of the district court entered on March 31, 1998, be and the same is hereby affirmed.

Costs taxed against appellant.

ATTEST:

s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

DATED: April 4, 2002

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* Honorable Jane A. Restani of the United States Court of International Trade, sitting by designation.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DENYING OBJECTIONS TO THE REPORT AND RECOMMENDATION DATED AND FILED MARCH 31, 1998

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 92-840 (JAG)

William J. Conery,

Plaintiff,

v.

John T. Niccollai, Jr., *et al.*,

and

Kenneth Burdge and Frank Fusco,

Plaintiffs,

v.

John T. Niccollai, Jr., *et al.*,

Defendants.

Appendix B

ORDER

This matter comes before the Court by way of Plaintiff Conery's Objections to United States Magistrate Judge G. Donald Haneke's Report and Recommendation issued on January 14, 1998, pursuant to L. Civ. R. 72.1(a) (2) and Fed. R. Civ. P. 72(b), granting summary judgment in favor of the Defendants; and Plaintiff Conery having submitted timely Objections to the Report and Recommendation; and the Defendants having submitted timely Objections to the Report and Recommendation; and the Defendants having submitted a timely response to the Objections; and, pursuant to L. Civ. R. 72.1(C) (2), the Court having conducted a *de novo* review of: (a) Magistrate Judge Haneke's recommended disposition of the dispositive motion; (b) the parties' subsequent submissions; and (c) the underlying record (*See Poveromo-Spring v. Exxon Corp.*, 968 F. Supp 219, 221 n.2 (D.N.J. 1997); *Hines v. Irvington Counseling Center*, 933 F. Supp. 382, 385 (D.N.J. 1996)); and good cause having been shown;

IT IS on this 31st day of March, 1998;

ORDERED that Plaintiff Conery's Objections to the Report and Recommendation are hereby denied; and

IT IS FURTHER ORDERED that the Report and Recommendation of Magistrate Judge Haneke is adopted as the opinion of this Court; and

IT IS FURTHER ORDERED that a copy of this Order be served on all parties within seven (7) days of the date of this Order.

s/ Joseph A. Greenaway, Jr.
JOSEPH A. GREENAWAY, JR., U.S.D.J.

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED JANUARY 14, 1998

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No.
92-840 (JAG)

[Consolidated]

WILLIAM J. CONERY,

Plaintiff

v.

JOHN NICCOLLAI, JR., *et al.*,

Defendants.

and

KENNETH BURDGE and FRANK FUSCO,

Plaintiffs,

v.

JOHN T. NICCOLLAI, JR., *et al.*,

Defendants.

Appendix C

REPORT AND RECOMMENDATION

Presently before the Court is a motion by the defendants for summary judgment against plaintiff William Conery. This matter has been referred to me by the Honorable Joseph A. Greenaway, Jr. for an appropriate Report and Recommendation pursuant to L. Civ. R. 72.1(a) (2) and Fed. R. Civ. P. 72(b). For the reasons expressed below, I respectfully recommend that the motion for summary judgment be granted.

STATEMENT OF FACTS

These consolidated cases arise out of claims brought by plaintiffs William J. Conery, Kenneth Burdge and Frank Fusco against various officers of Local 464A, United Food and Commercial Workers union ("Local 464A") for allegedly engaging in a continuous and systematic campaign of harassment to prohibit Conery and other union members from exercising their rights under the Labor Management Reporting and Disclosure Act ("LMRDA") and National Labor Relations Act ("NLRA") in order to suppress dissent within Local 464A.

Local 464A is a labor organization and is governed by the terms of its own by-laws and the Constitution of the United Food and Commercial Workers International Union, AFL-CIO ("International Union"). Local 464A's offices are located at 245 Paterson Avenue, Little Falls, New Jersey.

As of December 1996, Local 464A's membership consisted of approximately 18,250 full-time and part-time

active members. Local 464A's members include butchers and meat, deli and fish department employees in large supermarket chains, such as A&P, Shoprite, Pathmark and Kings. Its membership also includes employees working for employers in the meat processing and distribution industry.

At all times relevant to the Conery Complaint, the following defendants held the Local 464A offices/positions:

President	John T. Niccollai, Jr.
Secretary/Treasurer	Ramon Rando
Contract Administrator	Frank Hanley
Recorder	Griff McElroy
Vice President	Walter Biernacki
Business Agent	Frank DiChristina
Business Agent	Donald Ligon
Business Agent	Walter Wriker
Chairman, Exec. Board	George Plesa

Frank B. Fusco, the son of Frank Fusco, served as campaign manager for the 1989 slate of candidates comprised of Kenneth Burdge (candidate for President); Pat Gunnick (candidate for Secretary-Treasurer); John O'Brien (Candidate for Vice President); and Clara Malloy, all of whom ran against the above listed incumbents.

Plaintiff Fusco was appointed Secretary/Treasurer of defendant Local 464A In 1982, following the retirement of Secretary/Treasurer, John Niccollai, Sr. In 1983 and 1986, plaintiff Fusco was re-elected to his position as Secretary/ Treasurer. In 1982, defendant John T. Niccollai, Jr. was appointed to his position as President of defendant Local

464A as a result of the death of former president Anthony Tozzi. Defendant Niccollai was also re-elected President in the 1983 and 1986 elections.

I. Conery's Claims

Conery maintains that various officers of Local 464(a) organized and executed a campaign of harassment against him in response to Conery's dissident activities in Local 464A including Conery's decision to run for president in the union elections in 1989 and 1992. According to Conery, this harassment included (a) the filing of a civil RICO lawsuit in retaliation for Conery's dissident union activities; (b) the filing of an assault charge in Municipal Court to "convince" him to stop participating in union affairs; and (c) the verbal and physical harassment of Conery dating back to April of 1987 in order to suppress dissent within the union.

A brief overview of the factual and legal history giving rise to this case is necessary to assess the merits of the motion.

A. Conery's Union Membership.

Conery is a butcher. In August 1956, Conery joined Local 464A. In October 1961, Conery withdrew from Local 464A. On September 14, 1966, Conery was hired by Bell's Foodtown, an employer having a collective bargaining agreement with Local 464A. On October 14, 1966, Conery was reinstated as an active member of Local 464A.

In April 1987, Conery was elected to be a member of Local 464A's Contract Negotiation Committee. In addition,

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Conery served as a shop steward for a period of time while employed by ShopRite. *See* Appendix to Defendants' Brief in Support of the Motion (hereinafter DaC), page 166.

B. The Contested Elections.

a. The 1989 Election

At the heart of the issues between the parties in this case are the Union elections of 1989 and 1992 which were challenged by plaintiffs. In the 1989 Local 464A election, the following Local 464A members were nominated and ran against the incumbent Local 464A officers for the elected union offices: (1) President – K. Burdge; (2) Secretary/ Treasurer - P. Gunnick: (3) Vice President – J. O'Brien; and (4) Recorder – P. Malloy.

Frank B. Fusco,[1] the son of co-plaintiff, Frank Fusco, served as campaign manager for the 1989 slate of candidates comprised of Burdge, Gunnick, O'Brien and Malloy. DaC 333, In 4-18, DaC 835, DaC 341 in 13 to 19. On the advice of one of his physicians,[2] Conery did not run as a candidate in the 1989 election. Conery did, however, campaign for, encourage and support the slate of candidates headed by Burdge after his release from Carrier Clinic. DaC 171 ¶ 28.

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1. Frank B. Fusco was not a member of Local 464A.

2. Conery was hospitalized for psychiatric treatment at Riverview Medical Center from January 20, 1989 to February 1, 1989 (DaC 1208-1209), and at Carrier Clinic from February 24, 1989 to April 5, 1989 (DaC 1219).

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The 1989 election was held on June 14, 1989. The incumbents, Niccollai, Rando, Biernacki and McElroy were all reelected. By letter dated June 23, 1989, Conery filed a written protest with the Chairman of the Election Committee regarding the 1989 Local 464A election. By letter dated July 11, 1989, the Chairman of the Election Committee denied Conery's protest of the 1989 local 464A election. On July 5, 1989, Conery filed a protest of the 1989 Local 464A election with the International Union. On October 6, 1989, after investigating Conery's complaints, the International union issued a decision denying Conery's protest. DaC 759-768, 787-788, 785, 790-792.

On October 23, 1989, Conery wrote to the United States Department of Labor (IDOL) protesting the 1989 Local 464A election. The DOL conducted a comprehensive investigation of all of the complaints made by Conery. DaC 793-798; DaC 735 and 845. As part of the DOL's investigation with respect to the 1989 Local 464A election, the DOL interviewed Conery, Niccollai, Burdge, Fusco, Gunnick, O'Brien, Louis ROCCO, owner of Rocco Press, Bob Menegold, Election Committee Chairman, James Galvin, co-manager of the A&P Belvedere, John DeDolce, assistant manager A&P Budd Lake, Larry Hansen, co-manager of A&P Blairstown, Ban Thomas, co-manager of ASP Budd Lake, Vincent Fornino, Great Falls Security, Harold Kreiger, Esq., Manny Dasilva, John Alibrando and Bernard Mints, Esq., attorney for the National Labor Relations Board. The report of investigation prepared and approved on November 24, 1989 contained 35 exhibits including the written Reports of interview of the above named individuals. DaC 735 to 845, see list of exhibits DaC 757-758.

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When Burdge was interviewed by the DOL on November 7, 1989, he stated that he had actively campaigned in about twenty-six stores with no problems. Burdge also stated that Conery was not present at the nomination meeting for the 1989 elections and was not nominated for any position. In early 1990, based upon its comprehensive and thorough investigation of all of Conery's allegations, the DOL issued its written Statement of Reasons dismissing Conery's claims regarding the 1989 election. DaC 730 to 734.

b. The 1992 Election

The 1992 Local 464A election was conducted in June of 1992. Conery was nominated and ran for the office of President against the incumbent, Niccollai. Burdge ran for the office of Secretary-Treasurer, against incumbent Rando. Lawrence Scancarella ran for the office of Vice President against the then incumbent Biernacki. DaC 982. The incumbents were once again victorious.[3] Plaintiffs once again challenged the results.

Conery protested the June 9, 1992 election. He wrote to the Election Committee Chairman, addressing twenty-five complaints. After an internal investigation, the Election Committee Chairman found that Conery's complaints lacked merit. DaC 896 to 900. Subsequently, Conery wrote to the International Union. The International Union also conducted an investigation and found that the 1992 Local 464A election was conducted properly. DaC 909 to 915, 921.

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3. The incumbents won the election by a large majority. Niccollai received 2663 votes while Conery received 152. Rando received 2626 while Burdge received 167. Biernacki received 2575 and Scancarella received 201.

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On September 21, 1992, Conery wrote to the DOL protesting the 1992 Local 464A election and alleging the same complaints he addressed in his letter to the Election Committee Chairman and the International Union. His complaints resemble counts one through six in his Complaint before this Court. DOL investigated the charges and dismissed Conery's complaint. DaC 846 to 854.

C. Other Events

On October 21, 1981, Conery and a friend affixed political handbills critical of the incumbent officers of Local 464A to cars parked in Local 464A's parking lot and those parked on the street adjacent to the Union Hall, in Little Falls, New Jersey. Union members whose cars were parked outside complained to Local 464A that Conery had damaged their vehicles. Also, another tenant of the building, Dr. Anthony Boni, complained about Conery's handbilling. DaC 291, DaC 583. He claimed that Conery handbilled the cars of some of his patients. Local 464A called the Little Falls Police. When the police arrived the officer informed Conery that Little Falls had a handbill ordinance prohibiting distribution of handbills on private property. The officer allowed Conery to distribute his handbills on the sidewalk and the officer stood by. Dr. Boni filed a complaint in the Little Falls Municipal Court against Conery for illegal handbilling, but the prosecutor subsequently dropped the charges. DaC 293, DaC 359-363.

Another notable event occurred on August 16, 1990. On that date, Conery and DiChristina got into an argument. After the incident, DiChristina filed a complaint against

Conery in the Passaic Municipal Court for harassment. Conery later filed a cross complaint against DiChristina for harassment. DaC 412-413. On May 22, 1991, a municipal judge heard the trial of these two complaints. Both men were found guilty. DaC 487.

I. Standard of Review of the Local 464A Trial Board's Findings

The initial question to be addressed is the standard of review that the Court must apply to the Local 464A Trial Board's findings. Defendants argue that the trial board's findings should not be disturbed. Defendants rely on *International Brotherhood of Boilermakers v Hardeman*, 401 U.S. 233 (1971), which holds that the courts are not to disturb a trial board's findings where there is some evidence to substantiate the result. The plaintiff argues that the "some evidence" standard is inappropriate here. I agree.

When free speech activities are implicated, the court must review the trial board's findings *de novo*. *Black v. Ryder/ P.I.E. Nationwide Inc.*, 970 F.2d 1461, 1467 (6th Cir. 1992). In our case, Mr. Conery claims, *inter alia*, that the union interfered with his free speech rights by preventing him from distributing campaign leaflets; by attempting to provoke him into fighting to give the Union grounds to expel him; by instituting a RICO action against him; and by generally conspiring to prohibit him from exercising his rights. On the face of Conery's complaint, alleged violations of free speech rights are clearly implicated. Therefore, this Court must conduct a *de novo* review of the trial board's findings.

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II. Legal Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In deciding a motion for summary judgment, a court must view the facts in the light most favorable to the nonmoving party. *Bixler v. Central Pa. Teamsters Health & Welfare*, 12 F.3d 1292, 1297 (3d Cir. 1993). The moving party has the burden of establishing that there are no genuine issues of material fact. *See Celotex Corp. v. Catrett*, 477 U.S, 317, 322-24 (1986).

The Supreme Court has stated that, in applying the criteria for granting summary judgment:

> the judge must ask [. . .] not whether [. . .] the evidence unmistakably favors one side or the other, but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented. The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the (nonmoving) party. The judges inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the [non-movant] is entitled to a verdict [. . . .].

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. *Id.*

In order to resist a motion for summary judgment, a plaintiff must present "more than a mere scintilla of evidence" in his favor. He "cannot simply reallege factually unsupported allegations contained in his pleadings." *Id.* at 249; *see also Maguire v. Hughes Aircraft Corp.*, 912 F.2d 67, 72 (3d Cir. 1990). Only evidence that would be admissible at trial may be used to contest a summary judgment motion. Evidence with a deficient foundation must be excluded from consideration. *Williams v. Borough of West Chester*, 891 F.2d 458, 466 (3d Cir. 1989); *see also Trap Rock Indus., Inc. v. Local 82 , Int'l. Union of Operating Engineers*, 982 F.2d 884, 890-91 (3d Cir. 1992).

III. The Nature of Claims under LMRDA § 101

Seven of the original thirteen causes of action remain in Mr. Conery's complaint.[4] Six of the seven of the causes of action involve claims under § 101(a)(1) and (2) of the LMRDA, 29 U.S.C. § 411(a)(1) and (2). Section 101(a)(1) of the LMRDA was intended to guarantee union members the right to participate in Union campaigns and elections and to attend membership meetings. That section provides:

4. Counts One, Two, Three, Four, Five, Six and Thirteen are currently viable. Counts Seven through Twelve were dismissed prior to the current motion.

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> Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums or a labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

§ 101(a)(1) of the LMRDA, 29 U.S.C. § 411(a)(1) . The United States Supreme Court has examined § 101(a)(1) and determined that its provisions are narrow in scope. *Calhoon v. Harvey*, 379 U.S. 134, 138-39 (1964). The *Calhoon* Court explained that § 101(a)(1) is:

> no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote. And Congress carefully prescribed that even this right against discrimination is "subject to reasonable rules and regulations by the union."

Id. A cause of action by a union member cannot be sustained under § 101 without some claim of discrimination and some demonstration that the plaintiff has been denied the right to vote. *Id.*

Section 101(a)(2) was intended to guarantee union members the right to express their views and opinions regarding union elections and officers. That section provides:

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> Every member of any labor organization shall have the rights . . . to express any views, arguments or opinions . . . . Provided, that nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

§ 101(a)(2) of the LMRDA. 29 U.S.C. § 411(a)(2). Nevertheless, the Supreme Court has explained that a violation of free speech rights by itself is insufficient to violate § 101(a)(2). *Sheet Metal Workers' International Assoc. v. Lynn*, 488 U.S. 347, 353 (1989). The infringement on free speech must be viewed with reference to the basic objective of the LMRDA. *Id.*[5] That objective is "to ensure that unions [are] democratically governed, and responsive to the will of the union membership as expressed in open periodic elections." *Finnegan v. Leu*, 456 U.S. 431, 441 (1982). Therefore, the court must not only determine whether the union interfered with Mr. Conery's free speech rights, but also, if the union did interfere, whether that interference affected the democratic governance of the union.

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5. The defendants rely heavily on the interpretations of § 411(a) found in *Calhoon* and *Lynn*. The Court finds this reliance justified as these cases are binding precedents and plaintiff has wholly ignored these precedents in his brief.

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IV. Conery's First Cause of Action

In the first cause of action. Conery claims that the union violated his rights under § 101(a)(1) and (2) by preventing him from distributing campaign leaflets on October 21, 1991. Conery claims that Niccollai ordered other union agents to remove the literature he had placed on the cars in the union parking lot and to order Conery off the property. Nevertheless, Conery's actions on October 21, 1991 were in apparent violation of a local ordinance prohibiting leafletting on private property. Evidence shows that Dr. Anthony Boni, whose patients use the parking lot, telephoned police and later filed charges against Conery for his leafletting activity.

The defendants did not violate Conery's rights under § 101(a)(1) on October 21, 1991. Conery presents no evidence that shows that this incident interfered with the union's election or his right to vote or nominate candidates, *See Calhoon*, 379 U.S. at 138-39. Conery was distributing campaign material in violation of a local ordinance. He presents no evidence showing that the union allowed other members to distribute leaflets on private property. Furthermore, Conery failed to show how this incident affected his right to vote. He apparently participated in the 1992 election by running for president and by supporting other candidates. Therefore, Conery's first cause of action does not state a violation of § 101(a)(1).

Conery's failure to show how the alleged infringement of his free speech rights interfered with his rights to vote and nominate candidates is also fatal to his claim that the union violated his rights under § 101(a)(2). *Lynn*, 488 U.S.

at 353. As Conery ran for president and supported other candidates in the 1992 election, any alleged interference on October 21, 1991 did not interfere with the union's democratic governance. Conery has failed to establish any issues of material fact that could allow a jury to find in his favor. Therefore, I recommend that summary judgment be granted for defendants regarding the First Cause of Action in Conery's complaint.

V. Conery's Second Cause of Action

In his Second Cause of Action, Conery alleges that the union, Niccollai, and other defendants breached the November 3, 1988 settlement agreement between Local 464A and the plaintiff. Defendants allegedly breached the agreement by prohibiting Conery from carrying out his leafletting activities on October 21, 1991.[6]

This cause of action cannot withstand a motion for summary judgment. Any settlement agreement between Conery and the union and the other defendants could not give Conery permission to violate the law. Little Falls Ordinance 6.1-7 prohibits handbilling on private property. Connery's actions on October 21, 1991 were in violation of this ordinance. Furthermore, the union did not prohibit him from all handbilling. Conery distributed his materials on the cars parked on public property, namely the street adjacent to

6. Parenthetically, I do not believe that the leafletting incident occurring on October 21, 1991 constituted a violation of Conery's free speech rights because he was distributing the leaflets in violation of a local ordinance. This determination, however, is not essential to the finding that no § 411(a)(2) violation occurred.

the parking lot. Therefore, I recommend that summary judgment dismissing the Second Cause of Action be granted.

VI. Conery's Third Cause of Action

In Conery's Third Cause of Action, he claims that defendant DiChristina violated his rights by making unsolicited antagonistic remarks to Conery. DiChristina allegedly made these unsolicited remarks to provoke Conery into fighting. Plaintiff does not, however, offer the exact dates these alleged remarks occurred, nor does he offer any witnesses to corroborate the events. Further, Conery fails to allege or demonstrate how these remarks, if they occurred at all, interfered with his right to vote or nominate candidates or how they interfered with the democratic governance of the union. It is well settled that to oppose a summary judgment motion, the nonmoving party cannot merely rest on the pleadings. *Anderson*, 477 U.S. at 249. The facts before the court, even when viewed in a light most favorable to the plaintiff, do not make out a violation of § 101. Therefore, summary judgment should be granted dismissing the Third Cause of Action.

VII. Conery's Fourth Cause of Action

Conery's Fourth Cause of Action claims that Local 464A violated his rights by filing a lawsuit against him alleging RICO violations. According to Conery, the defendants' accusations against him violated his rights under § 101 (a)(1), (2) and (4). The RICO complaint underlying the Fourth Cause of Action was filed more than two years prior to the 1992 election of Local 464A. Conery does not sufficiently show

that the RICO complaint interfered with his rights to vote or nominate candidates or his free speech rights. Conery ran for office in 1992, campaigned and distributed political literature. In fact, Conery himself discussed the RICO complaint against him in the campaign literature he delivered in support of his candidacy for president in 1992. Furthermore, it does not appear from the record before me that the RICO complaint caused a chilling effect on Conery's free speech rights. From the time of the RICO complaint to the 1992 election, Conery distributed literature on numerous occasions, and campaigned in his own, behalf and on the behalf of others. Therefore, I recommend that the defendants' motion for summary judgment against Conery be granted with respect to the Fourth Cause of Action.

VIII. Conery's Fifth Cause of Action

In his fifth cause of action, Conery claims that defendant DiChristina, acting with the approval and support of defendants Niccollai and the union, violated his rights under § 101(a)(1) and (2) by filing a complaint in the City of Passaic. The Passaic complaint alleges that Conery harassed DiChristina by threatening to do him bodily harm and by communicating in a manner likely to cause annoyance; in violation of N.J.S.A. 2C:33-4(A)-(B). Conery cross-claimed that DiChristina harassed him by threatening to do bodily harm in violation of N.J.S.A. 2C:33-4(B). At the trial, the judge found both men not guilty. Now Conery claims that DiChristina's complaint in the City of Passaic violated his rights.

Conery's fifth cause of action is deficient in the same way his previous causes of action were deficient. He has not shown how the defendants' actions interfered with his rights to vote or nominate candidates or how they affected the democratic governance of the union. DiChristina's complaint was filed on August 15, 1990 and Conery's cross-complaint was filed on August 16, 1990. Both the complaint and the cross-complaint resulted in not guilty verdicts on May 22, 1991. Notwithstanding the Passaic complaint, Conery still participated in the 1992 election by running for president and campaigning. Therefore, I recommend that the Court grant summary judgment for the defendants regarding Conery's Fifth Cause of Action.

IX. Conery's Sixth Cause of Action

Conery's Sixth Cause of Action also alleges that the Union violated his rights under § 101 (a)(1) and (2). The union allegedly violated his rights by forcing Frank Fusco to refrain from any political union activity in order to receive his retirement benefits and by requesting the Superior Court of New Jersey to enjoin him from engaging in any union politics including but not limited to distributing campaign literature for, or speaking on behalf of Conery.

On May 26, 1987, Fusco entered a retirement agreement with Local 464A. This agreement was memorialized in letters referred to as "Letter Agreements." The Letter Agreements stipulated that Fusco would refrain from participating in union affairs, and in return, the union would provide him with retirement benefits and severance pay. It appears that Fusco entered into this agreement voluntarily. Subsequently,

the union fulfilled its obligations under the contract by paying Fusco the benefits and severance pay. Thereafter, Fusco breached his agreement with the union and the union filed suit.

Conery now claims that the agreement between Fusco and the union violated his rights under the LMRDA. Here again, however, Conery fails to convince this Court that his rights were indeed violated. Under the LMRDA, Conery has the right to vote and nominate candidates for union election. § 101(a)(1). The LMRDA also prevents unions from interfering with the free speech rights of their members to such an extent that it affects the democratic governance of the union. § 101(a)(2); *Lynn*, 488 U.S. at 353. Fusco entered an agreement with the union exchanging his participation in union elections for retirement benefits and severance pay. Fusco voluntarily agreed not to participate.[7] Fusco's decision not to participate does not constitute a violation of Canary's rights, nor does the union's subsequent action against Fusco

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7. An agreement between a union and a member where the member agrees to forfeit certain rights in exchange for other benefits is perfectly legal. *Parini v. International Brotherhood of Teamsters*, 568 F. Supp. 1246, 1249 (N.D. Ill. 1983) (holding that the Union did not violate the LMRDA by agreeing to give Parini a job in exchange for his not running for office), *aff'd* 749 F.2d 34 (7th Cir. 1984); *see also Finnegan v. Leu*, 456 U.S 431, 440 (1982) (holding that the union's retaliatory discharge of employees who actively supported the president's opponent did not violate the LMRDA because the members had a choice between exercising their right to free expression or keeping their jobs). Similarly, here, Fusco has a choice between entering into the agreement with the union or continuing to exercise his rights. Therefore, the contract between Fusco and the union was permissible.

to enforce the agreement. Conery was still able to participate in elections. Therefore, I recommend that summary judgment dismissing the Sixth Cause of Action be granted.

X. Conery's Thirteenth Cause of Action

Finally, in his Thirteenth Cause of Action, Conery claims that the union violated his LMRDA rights under § 101(a)(1) and (2) by engaging in a continuous, systematic and ongoing scheme to suppress dissent and prevent Conery from exercising his rights. Conery argues that this count must withstand a motion for summary judgment because a union can engage in a purposeful scheme to suppress, even if the particular actions in which they engaged are not independently unlawful. *Schermerhorn v. Local 100, Transport Workers Union*, 91 F.3d 316, 323 (2d Cir. 1996). Nevertheless, plaintiff fails to address the Supreme Court's narrow interpretation of § 101(a)(1) and (2) of the LMRDA, espoused in *Calhoon* and *Lynn*. As stated above in discussion of the other causes of action, Conery has failed to establish that the union interfered with his rights under the LMRDA or that the democratic process of Local 464A suffered due to the union's interference with the rights of its members. Therefore, I recommend that summary judgment dismissing the Thirteenth Cause of Action be granted.

Appendix C

CONCLUSION

For the reasons stated above, I recommend that the defendants' motion for summary judgment be granted in all respects.

Respectfully submitted,

s/ Donald Haneke
Donald Haneke,
United States Magistrate Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MAY 9, 2002

No. 01-2870

WILLIAM J. CONERY; FRANK A. FUSCO; KENNETH BURDGE

v.

JOHN NICCOLLAI, JR., individually and in his official capacity as President of Local 464A, Food and Commercial Workers Union, AFL-CIO; RAMON RANDO, individually and in his official capacity as Secretary-Treasurer of Local 464A; GRIFF McELROY, individually and in his capacity as Recorder of Local 464A; GEORGE PLESA, individually and in his official capacity as Chairman of the Executive Board of Local 464A; FRANK HANLEY, individually and in his official capacity as Contract Administrator; FRANK DICHRISTINA; DONALD LIGON; WILLIAM WRIKER, individually and in their official capacities as Business Agents of Local 464A; UNITED FOOD COMMERCIAL WORKERS UNION, AFL-CIO; SHOPRITE SUPER-MARKETS, INC.; WALTER BIERNACKI, individually and in his official capacity as Vice President of Local 464A; WAYNE WILLIAMS, individually and in his capacity as Director-Pension & Prescription Benefits of Local 464A; JOHN T. NICCOLLAI, SR., individually and in his capacity as Trustee of the Local 464A Pension Fund; Local 464A, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; LOCAL 464A PENSION FUND ADMINISTRATOR AND BOARD OF

Appendix D

TRUSTEES; MARTIN QUINN, in their capacity as administrators and trustees of the Local 464A Pension Fund; GILBERT C. VUOLO, in their capacity as administrators and trustees of the Local 464A Pension Fund; DEWEY CANNELLA, in their capacity as administrators and trustees of the Local 464A Pension Fund; ISADORE ZALKIN, in their capacity as administrators and trustees of the Local 464A Pension Fund,

v.

JOHN NICCOLLAI, JR.; RAMON RANDO; GRIFF McELROY; GEORGE PLESA; FRANK HANLEY; FRANK DICHRISTINA; DONALD LIGON; WILLIAM WRIKER; WAYNE WILLIAMS; JOHN T. NICCOLLAI, SR.; MARTIN QUINN; GILBERT C. VUOLO; DEWEY CANNELLA; ISADORE ZALKIN; WALTER BIERNACKI,

Third Party Plaintiffs,

v.

HAROLD KRIEGER, The Estate of Harold Krieger; STEPHANIE KRIEGER; LOWELL HARDWOOD, as Executors of the Estate of Harold Krieger,

Third Party Defendants.

Appendix D

(D.C. No. 92-cv-00840)

FRANK A. FUSCO; KENNETH BURDGE,

v.

JOHN T. NICCOLLAI, JR., individually and in his capacity as President of local 464A, United Food and Commercial Workers International Union, and as Trustee of the Local 464A Pension Fund; RAMON RANDO, individually and in his capacity as Secretary-Treasurer of Local 464A and as Trustee of the Local 464A Pension Fund; GRIFF McELROY, individually and in his capacity as Recorder of Local 464A; FRANK HANLEY, individually and in his capacity as Contract Administrator of Local 464A; WAYNE WILLIAMS, individually and in his capacity as Director-Pension & Prescription Benefits of Local 464A; JOHN T. NICCOLLAI, SR., individually and in his capacity as Trustee of the Local 464A Pension Fund; LOCAL 464A, UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO; LOCAL 464A PENSION FUND ADMINISTRATOR AND BOARD OF TRUSTEES; WALTER BIERNACKI, individually and in his capacity as Vice President of Local 464A and as Trustee of the Local 464A Pension Fund; MARTIN QUINN, in their capacity as administrators and trustees of the Local 464A Pension Fund; GILBERT C. VUOLO, in their capacity as administrators and trustees of the Local 464A Pension Fund; DEWEY CANNELLA, in their capacity as administrators and trustees of the Local 464A Pension Fund; ISADORE ZALKIN, in their capacity as administrators and trustees of the Local 464A Pension Fund.

Appendix D

(D.C. No. 92-cv-01458)

William J. Conery,

Appellant

(D.C. Nos. 92-cv-00840 & 92-cv-01458)

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*,
SLOVITER, SCIRICA, NYGAARD, ALITO, ROTH,
McKEE, RENDELL, BARRY, AMBRO, FUENTES,
and COWEN*, *Circuit Judges* and RESTANI**, *Judge*,
United States Court of International Trade

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

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* As to panel rehearing only

** The Honorable Jane A. Restani, Judge, United States Court of International Trade, who sat by designation, as to panel rehearing only.

Appendix D

BY THE COURT,

s/ [illegible]
Circuit Judge

Dated: May 09 2002

APPENDIX E — RELEVANT STATUTE

BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

29 USCS § 411. Bill of rights; constitution and bylaws of labor organizations

(a)(1) Equal rights. Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

* * *

Appendix E

(4) Protection of the right to sue. No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

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